UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 23

Docket No. SF-0752-09-0881-I-1

Johnnie L. Brown,

Appellant,

v.

United States Postal Service,

Agency.

February 11, 2011

Johnnie L. Brown, Oakland, California, pro se.

Carla Ceballos, Long Beach, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed her involuntary retirement appeal as untimely filed. For the reasons discussed below, we GRANT the petition for review, VACATE the initial decision, and DISMISS this appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant is a former Supervisor of Distribution Operations at the agency's Processing and Distribution Center in Oakland, California. Initial Appeal File (IAF), Tab 1 at 1, Tab 8, Ex. 1. She has alleged that the agency coerced her retirement after 34 years of service by subjecting her to a hostile,

discriminatory work environment for many years that caused her severe emotional distress culminating in an incident in which she lost consciousness at work in August 1999 while meeting with her supervisor. IAF, Tab 1 at 2-3, Tab 10 at 1-2, 5. Following that incident, the appellant never reported back for work, and she retired effective August 2, 2000.[1] IAF, Tab 5 at 15, 24; Tab 8, Ex. 1; Tab 10 at 5. The appellant filed this appeal on August 11, 2009, alleging that her retirement was involuntary.[2] IAF, Tab 1 at 2, 9.

¶3 In the interim, the appellant unsuccessfully pursued claims before the Equal Employment Opportunity Commission and in federal court that the agency unlawfully discriminated against her in certain aspects of her employment based on her sex, age, and prior equal employment opportunity (EEO) activity. IAF, Tab 5, Apps. A-H, V. The U.S. District Court for the Northern District of California denied most of her discrimination claims on the merits, IAF, Tab 5, Apps. E, F, but refused to consider the merits of her forced retirement/constructive removal allegation, finding that the appellant had failed to exhaust her administrative remedies by filing a formal EEO complaint on that particular issue following her departure from duty, IAF, Tab 5, App. F at 17. The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's judgment, IAF, Tab 5, App. D, and after the U.S. Supreme Court declined to hear

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[1] The record reflects that the appellant's retirement is "nondisability." IAF, Tab 5, App. U at 5-7.

[2] The appellant also claimed to be contesting a reduction in grade or pay, a negative suitability determination, a denial of a within grade increase, a claim under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333), and an enforced leave suspension. IAF, Tab 1 at 2, 5, Tab 7 at 4-5. The administrative judge dismissed these claims in the initial decision, IAF, Tab 12 at 1-2 n.1, 4-5 & n.5, and the appellant has limited her argument on review to her involuntary retirement claim, which has been the primary focus of the parties throughout this appeal, Petition for Review File, Tab 1. Thus, we will not consider these other alleged actions any further. *See* 5 C.F.R. § 1201.114(b) ("The Board normally will consider only issues raised in a timely filed petition for review or in a timely filed cross petition for review.").

her discrimination case, IAF, Tab 5, Apps. A, B, the appellant filed this appeal with the Board, IAF, Tab 1.

¶4 The agency argued for dismissal of the appeal on timeliness grounds and for lack of jurisdiction because the appellant had failed to make a nonfrivolous allegation that her retirement was the type of involuntary action within the Board's review authority. IAF, Tab 6. After affording the parties the opportunity to address those issues, IAF, Tab 2 at 2-4, Tab 9, the administrative judge issued an initial decision dismissing the appeal as untimely filed by nearly 9 years with no good cause shown for the delay, IAF, Tab 12, Initial Decision (ID) at 2, 8, 10-11. The administrative judge did not reach the jurisdictional issue of whether the agency had subjected the appellant to an appealable action. ID at 3 n.2. The appellant has filed a petition for review asserting that the administrative judge erroneously concluded that there was no good cause for the filing delay. Petition for Review (PFR) File, Tab 1.[3]

ANALYSIS

The administrative judge erred by deciding the timeliness issue without first determining that the Board has jurisdiction over this appeal.

¶5 In an appropriate case, an administrative judge may assume that an appealable action occurred and that the appellant has standing to appeal and may proceed to dismiss an appeal as untimely filed if the record on timeliness is sufficiently developed. *Petric v. Office of Personnel Management*, 108 M.S.P.R. 342, ¶ 6 (2008). Such an approach is not appropriate, however, if the jurisdictional and timeliness issues are inextricably intertwined, that is, if

[3] After the close of the record on review, PFR File, Tab 2 at 1, the appellant filed additional documentary evidence, PFR File, Tabs 5, 6. We have reviewed these submissions and find that they are immaterial to the issue of the Board's jurisdiction over this matter. Thus, we find it unnecessary to determine whether the appellant has shown that these untimely submissions are based on information that was not readily available before the record closed. *See* 5 C.F.R. § 1201.114(i).

resolution of the timeliness issue depends on whether the appellant was subjected to an appealable action. *Id.* The issues of timeliness and jurisdiction are typically inextricably intertwined in an appeal based on an alleged involuntary retirement because if the agency has subjected the employee to an appealable action then the agency's failure to inform an employee of her right to appeal may excuse an untimely filed Board appeal. *See id.*; *Hanna v. U.S. Postal Service*, 101 M.S.P.R. 461, ¶ 6 (2006); *Higgins v. U.S. Postal Service*, 86 M.S.P.R. 447, ¶¶ 6-10 (2000). Generally, an appellant may establish good cause for an untimely filing of an involuntary resignation or retirement appeal if, at the time of the employee's resignation or retirement, the agency knew or should have known of facts indicating that the action was involuntary but did not inform the appellant of her appeal rights. *Shelton v. Department of the Army*, 99 M.S.P.R. 126, ¶ 7 (2005). If an agency failed to advise an employee of appeal rights when it should have done so, the appellant is not required to show that she exercised due diligence in attempting to discover her appeal rights; rather, the appellant must show that she was diligent in filing an appeal after learning that she could do so. *Id.*; *Gingrich v. U.S. Postal Service*, 67 M.S.P.R. 583, 588 (1995).

¶6 The administrative judge concluded that the issues of jurisdiction and timeliness are not intertwined in this involuntary retirement case because the appellant received notice from sources other than the agency of her need to pursue administrative remedies, the appellant did not diligently seek out those remedies, and the appellant failed to establish that her medical condition was good cause to excuse her lack of diligence. ID at 3-4 & n.2, 9-10. Under the circumstances of this case, however, we find that the appellant may not have been obligated to discover her Board appeal rights and the administrative judge should not have dismissed the appeal as untimely without considering the related jurisdictional issues.

¶7 The administrative judge found persuasive that the U.S. District Court for the Northern District of California issued an order in 2004 granting the agency's

motion for summary judgment on her constructive discharge/involuntary retirement claim because the appellant had failed to exhaust her "administrative remedies." ID at 9. However, in that order, the district court was referring to the appellant's failure to exhaust a discrimination claim with the Equal Employment Opportunity Commission. IAF, Tab 5, App. F at 17. The district court's decision never mentioned the Merit Systems Protection Board or the possibility that the appellant could pursue an involuntary retirement appeal before the Board. *Id.* Similarly, the subsequent decision of the U.S. Court of Appeals for the Ninth Circuit did not mention any right of appeal to the Board. *Id.*, App. D at 2. Nothing in the record suggests that the agency informed the appellant of such an appeal right at any time during those proceedings. In these circumstances, we find that the district court's reference to "administrative remedies" was not sufficient notice to the appellant of her Board appeal rights. *Cf. Shelton*, 99 M.S.P.R. 126, ¶ 12 (even if an employee receives notice of a general Board appeal right from a source other than the agency, such notice does not excuse an agency's failure to inform the employee of appeal rights if the notice does not inform the employee of the time limit for filing an appeal to the Board and lacks other information on where and how to file such an appeal).

¶8 Because the issues of timeliness and jurisdiction are inextricably intertwined in this appeal, the administrative judge should not have dismissed the appeal on timeliness grounds without first addressing jurisdiction. *See Petric*, 108 M.S.P.R. 342, ¶ 6; *Hanna*, 101 M.S.P.R. 461, ¶ 6; *Shelton*, 99 M.S.P.R. 126, ¶ 15; *Higgins*, 86 M.S.P.R. 447, ¶ 6.[4]

[4] The appellant has argued that she is timely appealing the Supreme Court's decision denying certiorari in her discrimination case. IAF, Tab 7 at 1. Her argument is without merit because there is no right to appeal to the Board from the Supreme Court's decision.

The appellant failed to make a nonfrivolous allegation that her retirement was an involuntary action within the Board's jurisdiction.

¶9 Generally, the Board lacks the authority to review an employee's decision to resign or retire, which is presumed to be a voluntary act. *See, e.g.*, *Searcy v. Department of Commerce*, 114 M.S.P.R. 281, ¶ 12 (2010). However, if an agency essentially coerced the employee's decision in a manner that deprived her freedom of choice, the Board will take jurisdiction over the matter as a constructive removal. *Heining v. General Services Administration*, 68 M.S.P.R. 513, 519-20 (1995); *see Scharf v. Department of the Air Force*, 710 F.2d 1572, 1574 (Fed. Cir. 1983) (stating that the guiding principle in determining whether a resignation or retirement is involuntary is the employee's ability to exercise free choice under the surrounding circumstances).

¶10 "[T]he doctrine of coercive involuntariness is a narrow one." *Staats v. U.S. Postal Service*, 99 F.3d 1120, 1124 (Fed. Cir. 1996). As explained by our reviewing court, "an employee must show that the agency effectively imposed the terms of the employee's resignation or retirement, that the employee had no realistic alternative but to resign or retire, and that the employee's resignation or retirement was the result of improper acts by the agency." *Id.* If an employee's working conditions are so intolerable that the employee is forced to resign or retire, the employee's resignation or retirement is involuntary and constitutes a constructive removal. *E.g.*, *Heining*, 68 M.S.P.R. at 520. The issue is whether, considering the totality of the circumstances, the employee's working conditions were made so difficult that a reasonable person in the employee's position would have felt compelled to resign. *Id.*; *see Shoaf v. Department of Agriculture*, 260 F.3d 1336, 1342 (Fed. Cir. 2001) ("To objectively determine whether a reasonable person in the employee's position would have felt compelled to resign, a deciding tribunal must consider the totality of the circumstances."). In making this determination, the Board will consider allegations of discrimination and reprisal only insofar as those allegations relate to the issue of voluntariness and

not whether they would establish discrimination or reprisal as an affirmative defense. *Markon v. Department of State*, 71 M.S.P.R. 574, 578 (1996); *see Vitale v. Department of Veterans Affairs*, 107 M.S.P.R. 501, ¶ 20 (2007).

¶11 The appellant bears the burden of proving by preponderant evidence that the matter she is appealing is within the Board's authority to review. *See Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1344 (Fed. Cir. 2006) (en banc); 5 C.F.R. § 1201.56(a)(2)(i). If the appellant makes a nonfrivolous allegation that the matter is within the Board's jurisdiction, she is entitled to a hearing at which she must prove jurisdiction. *Garcia*, 437 F.3d at 1344. A nonfrivolous allegation in this context is an allegation of fact that if proven could establish that the agency coerced the appellant's resignation. *See Braun v. Department of Veterans Affairs*, 50 F.3d 1005, 1008 (Fed. Cir. 1995); *Harris v. Department of Veterans Affairs*, 114 M.S.P.R. 239, ¶ 9 (2010). Although the appellant did not request a hearing below, IAF, Tab 1 at 2, the administrative judge informed the appellant that if she made a nonfrivolous allegation that her appeal was within the Board's jurisdiction then she would have an additional opportunity to develop the record and prove her allegations by preponderant evidence, IAF, Tab 2 at 3. Because the administrative judge dismissed the appeal as untimely and did not reach the jurisdictional issue, the administrative judge never afforded the appellant such a further opportunity to develop the record; however, the appellant was given adequate notice and an opportunity to make a nonfrivolous allegation that her retirement was involuntary, IAF, Tab 2 at 2-4, Tab 6 at 4-7. For the following reasons, we find that the appellant failed to make a nonfrivolous allegation that her retirement is an action within the Board's jurisdiction.

¶12 The appellant's submissions on the jurisdictional issue refer to incidents of alleged harassment and discrimination that occurred between 1991 and 1999. *E.g.*, IAF, Tab 5 at 10 & App. T at 43-44. The fact that the appellant continued to work for a long period of time after experiencing what she considered to be

harassment indicates that she had an alternative to retiring based on the earlier incidents. *See Terban v. Department of Energy*, 216 F.3d 1021, 1024-25 (Fed. Cir. 2000); *Searcy*, 114 M.S.P.R. 281, ¶ 13. Nevertheless, we have considered all of her allegations, at least as context for the events that more immediately preceded her retirement. *E.g.*, IAF, Tab 5 at 12-27 & App. T at 43-59; *see Braun*, 50 F.3d at 1007 (a determination of whether a resignation is involuntary is not based on a mere "snapshot at the instant of [the employee's] resignation" but should take into account all of the surrounding circumstances). However, we will focus our discussion on what we find to be the appellant's most significant allegations, which the appellant repeatedly emphasized in her submissions on the jurisdictional issue and which generally occurred closest in time to her retirement. *E.g.*, IAF, Tab 5 at 12-27; *see Terban*, 216 F.3d at 1024 ("[T]he most probative evidence of involuntariness will usually be evidence in which there is a relatively short period of time between the employer's alleged coercive act and the employee's retirement. In contrast, a long period of time between the alleged coercive act and the employee's retirement diminishes the causal link between these two events and, thus, attenuates the employee's claim of involuntariness.").

¶13 The appellant claims that she received what she considered to be a punitive supervisory assignment in May 1996 and thereafter was forced to work a large volume of mail with a small number of employees. IAF, Tab 5, App. T at 50. She claims that her supervisors groundlessly criticized her work, forced her to meet goals with an insufficient staff, and improperly denied her a merit increase and bonus in 1997. IAF, Tab 5 at 13-14, 24 & App. T at 55-56. She continued in this manner for several years but felt that management was making increasing demands that she perceived as trying to cause her to fail. IAF, Tab 5, App. T at 55-56. She perceived that she was being singled out on account of her sex, age, and prior EEO activity. IAF, Tab 5 at 10. In early 1999, her unit was making its quotas/goals, but only because of what she described as her unit's "extreme effort." IAF, Tab 5, App. T at 55. She claims that from May through July 1999

other shifts were leaving additional work for her short-handed unit and that her unit was being forced "to work the mail out of color sequence," which created additional difficulties. IAF, Tab 5 at 22 & App. T at 55-56. She also asserted that younger supervisors were allowed to use more employees and were "not forced to work sacks of mail only." IAF, Tab 5 at 10, 14, 16. She claims that in mid-August 1999 other supervisors were allowed to change their schedules while she was denied the same opportunity. IAF, Tab 5 at 10 & App. T at 57. She perceived that she was being treated differently because she was a woman and was older. IAF, Tab 5 at 10. On August 15, 1999, she was instructed to split sacks of mail with another unit, but became concerned when all of the sacks were ordered back to her unit. IAF, Tab 5 at 10 & App. T at 57. On August 18, 1999, she was called to her supervisor's office. IAF, Tab 5 at 25. The appellant claims that she was apprehensive because she thought her supervisor was "trying to build a case against her and trying to take some type of disciplinary action against [her]" and her supervisor had denied her request to have her representative with her. IAF, Tab 5, App. T at 58. The appellant claims that, after her supervisor gave her a direct order to go to her office, she "blacked out" and was taken by ambulance to the emergency room. *Id.*; *accord* IAF, Tab 5 at 25. After that point, it seems that the appellant was under the care of her psychologist and did not return to work before she retired approximately a year later. IAF, Tab 5 at 15, 24-25.

¶14 The appellant has not alleged that the agency took further action against her during the year she was not working that induced her to retire. It appears that in June 2000, the Office of Workers' Compensation Programs denied her traumatic injury claim in connection with the incident on August 18, 1999, but advised her to consider filing another occupational disease claim related to additional incidents she referenced dating from 1991. IAF, Tab 1 at 39. Regarding the specific impetus for her retirement in August 2000, the appellant alleged only that "she filed her retirement after she explained to a friend that she

was unable to meet her financial obligations, and she was advised that she could submit her request for retirement." IAF, Tab 10 at 5.

¶15 We find that the appellant has failed to make a nonfrivolous allegation that the agency coerced her retirement. An employee is not guaranteed a stress-free working environment. *Miller v. Department of Defense*, 85 M.S.P.R. 310, ¶ 32 (2000). "Dissatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are generally not so intolerable as to compel a reasonable person to resign." *Id.*; *accord Searcy*, 114 M.S.P.R. 281, ¶ 13. Considering the totality of the circumstances, we find that the appellant failed to make a nonfrivolous allegation that the agency had denied her any realistic choice but to retire. Nothing in the record suggests that the agency was forcing the appellant to make any type of decision in August 2000 and her decision to retire at that time appears to have been entirely self-initiated. At the time she retired, she was pursuing her discrimination complaints through the EEO process, and the record does not reflect that her complaints were not being properly considered in that context. *E.g.*, IAF, Tab 1 at 14-15, Tab 5, App. V; *see Axsom v. Department of Veterans Affairs*, 110 M.S.P.R. 605, ¶ 17 (2009). Further, the Office of Workers' Compensation Programs was evidently providing her further opportunity to support her claims for benefits. IAF, Tab 1 at 39. Although the appellant claims to have been apprehensive of the agency taking a disciplinary action against her at the time she stopped reporting to work, IAF, Tab 5 at 25, she has not alleged that the agency had even proposed such an action at the time she retired a year later. Instead of retiring based on her speculation that such an action might occur in the future, the appellant clearly had an option of contesting an action she thought was invalid if and when it did occur. *See Axsom*, 110 M.S.P.R. 605, ¶ 17; *see also Garcia*, 437 F.3d at 1329 (a resignation is not involuntary if the employee had a choice of whether to resign or contest the validity of the agency action). The appellant has failed to allege that any event occurred relatively close in time to her retirement that could have given a

reasonable employee no choice but to retire. Even viewed in light of her claims of a continuing pattern of harassment dating back many years, the events that the appellant describes as having occurred in 1999 and 2000 could not, if proven, rise to the level of coercion necessary to overcome the presumption that her retirement was voluntary. *See Terban*, 216 F.3d at 1025.

¶16 We have considered the appellant's medical evidence regarding the conditions she asserts were caused by her hostile and discriminatory working environment. *E.g.*, IAF, Tab 5, App. T. The appellant asserted below that the Board has jurisdiction over this matter because she is disabled under the Americans with Disabilities Act and the agency denied her request for a reasonable accommodation. IAF, Tab 5 at 8-14, Tab 7 at 4. The Board lacks jurisdiction over the appellant's claim of disability discrimination absent an otherwise appealable action.[5] *See Carey v. Department of Health & Human Services*, 112 M.S.P.R. 106, ¶ 5 (2009); *Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980) (5 U.S.C. § 2302(b) is not an independent source of Board jurisdiction), *aff'd*, 681 F.2d 867, 871-73 (D.C. Cir. 1982). Nevertheless, an agency's denial of a reasonable accommodation to an eligible employee is a factor to be considered in determining whether the agency coerced the appellant's resignation or retirement. *See Carey*, 112 M.S.P.R. 106, ¶ 7.

¶17 The appellant has alleged in general terms that the agency denied her request for light duty that would have enabled her to continue working. IAF, Tab 5 at 11, 13, Tab 7 at 4. The record reflects that the appellant requested a light duty assignment "away from the supervisory stressful environment" in March 1997, which the agency denied. IAF, Tab 5, App. Q at 7-9. The appellant nevertheless continued to work for almost 2½ years after the agency denied her request, indicating that the appellant had the option of continuing to work

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[5] It does not appear that the appellant alleged disability discrimination before the Equal Employment Opportunity Commission or in her federal court litigation.

following the denial of that request. *See Terban*, 216 F.3d at 1024-25; *Searcy*, 114 M.S.P.R. 281, ¶ 13. At the time the appellant retired, she had been away from the alleged intolerable working environment for about a year. *See Axsom*, 110 M.S.P.R. 605, ¶ 16. There is no indication in the record that the appellant had made a new request for accommodation or indicated that she wished to return to work before she decided to retire in August 2000. To the contrary, the records the appellant has submitted, particularly the contemporaneous reports prepared by the appellant's psychologist, unequivocally show that the appellant and her psychologist believed that she could not work under any circumstances at the time she decided to retire. IAF, Tab 1 at 4, Tab 5, App. T at 70, 76-77, 92-93, 100. Even if the appellant genuinely felt that she had no alternative but to retire, in part due to her medical conditions, the appellant has failed to make a sufficient allegation of a coercive or improper act on the part of the agency that could have left a reasonable person in her position with no other choice but to resign in August 2000. *See Staats*, 99 F.3d at 1124 (the narrow doctrine of coercive involuntariness applies when a decision to retire "was the result of improper acts by the agency" and not merely when an employee retires because "he does not want to accept [actions] that the agency is authorized to adopt, even if those measures make continuation in the job so unpleasant for the employee that he feels that he has no realistic option but to leave"); *Vitale*, 107 M.S.P.R. 501, ¶ 26 (although an agency official may have caused the appellant apprehension and exacerbation of his medical ailments, he failed to establish that his working conditions were so intolerable that a reasonable person in his position would have felt compelled to retire).

ORDER

¶18 Accordingly, we dismiss this appeal for lack of jurisdiction. This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.